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National Guard—State Officers—State Constitutional Prohibition Against Holding Office of Trust and Profit Under United States

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NATIONAL GUARD—STATE OFFICERS—STATE CONSTITUTIONAL PROHIBITION AGAINST HOLDING OFFICE OF TRUST AND PROFIT UNDER UNITED STATES—[Kentucky].—Plaintiff, a circuit clerk in a Kentucky court, who held a captain's commission in the Kentucky National Guard, was directed by presidential order to report with his unit for a year's training in the United States army. A provision in the Kentucky constitution prohibits any state officer from holding an office of trust and profit in the Government of the United States. Plaintiff brought an action for a declaratory judgment to the effect that his position in the National Guard was not within the prohibition of the Kentucky constitution. *Held*: Plaintiff's commission was not an office of trust and profit in the government of the United States, on the grounds that his service was to be temporary and that he would not be required to take any additional oath, but would serve under the commission issued to him by the Governor of Kentucky. *Kennedy v. Cook*.¹

The effect and meaning of the Kentucky constitutional provision hinges upon the interpretation of "an office of trust and profit under the United States."² The question of what constitutes such an office has come up in many jurisdictions, for many states have substantially the same constitutional prohibition.³ Generally, the courts have not defined the clause, but have been content to decide each case on its particular facts. However, in many cases the courts have cited *United States v. Hartwell*⁴ and *United States v. Smith*,⁵ where an officer of the United States was defined as one who "can only be appointed by the President by and with the consent of the Senate, or by a court of law, or the head of a department." In *Groves v. Barden*,⁶ the court took the view that an office in the United States government is "a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being and which is exercised for the benefit of the public."

The Kentucky court side-stepped an opportunity to lay down a hard and fast rule which might be used as a guide for similar fact situations in the future, and limited its decision strictly to facts presented by the record. No cases could be found involving the narrow question of whether, under the current Presidential Orders and Army Regulations, a National Guardsman inducted into the United States army for a year's training is a United States officer. But the court cited *Fekete v. East St. Louis*,⁷ a 1917 case, which involved a similar problem. In 1916 Congress had passed the National Defense Act,⁸ which gave to the President the power to call the National Guard into the service of the United States. Fekete was a city attorney and a captain in the National Guard, who, after being inducted into the

1. (Ky. 1940) 146 S. W. (2d) 56.

2. Ky. Const., sec. 237.

3. E. g., Missouri, Alabama, California, Illinois, Indiana, Louisiana, Nebraska, New Jersey, South Carolina, Tennessee, Texas, Vermont, and Wisconsin.

4. (U. S. 1868) 6 Wall. 385.

5. (1888) 124 U. S. 525.

6. (1915) 169 N. C. 8, 84 S. E. 1042.

7. (1917) 315 Ill. 58, 145 N. E. 692, 40 A. L. R. 650.

8. (1916) 39 Stat. 211, sec. 111, 32 U. S. C. A. (1928) Sec. 81.

United States Army in 1917, was commissioned captain in the United States army and took the federal oath. The court held that Fekete had ceased to be a member of the National Guard and held an office of "honor and profit" under the federal government within the meaning of the Illinois constitutional prohibition.⁹ Similarly, in *Lowe v. State*,¹⁰ a judge who was a captain in the National Guard was found to hold a federal office within the meaning of the Texas constitutional prohibition, after he was called into the United States Army in 1917.

The federal statute involved in *Fekete v. East St. Louis* and in the instant case was the same,¹¹ and in 1917, as well as at the present time, the National Guardsmen received federal pay and used federally owned equipment. The basis for the different conclusion in the instant case lay in the administration of the National Defense Act in 1917, as contrasted with that of 1940. Under the Act of Congress of 1917, the President had the power to call the National Guard into the federal service for the period of the "existing emergency unless sooner discharged."¹² In 1940, however, Congress adopted a joint resolution¹³ authorizing the President merely to induct the National Guard into the military service of the United States. Pursuant to this resolution, the president issued an order¹⁴ directing the National Guard to report for a year's intensive training in the United States Army, and an Army Regulation¹⁵ of March 1940 provided that National Guard officers in the federal service were not required to take any additional oath, but were to serve under the commissions issued by the governors of their respective states.

It is quite probable that similar controversies will arise in other states which have substantially the same constitutional provisions. If the court's reasoning is generally adopted by other jurisdictions, the civil income and economic security of National Guard officers derived from the home state is not likely to be disturbed under the existing Joint Resolution, Presidential Orders, and Army Regulations, so long as the state governments have some control, nominal and tenuous though it may be.

V. T. M.

STATUTORY CONSTRUCTION—MISSOURI SOCIAL SECURITY ACT—SUPPORT OF APPLICANT BY RELATIVE—[Missouri].—The Missouri Social Security Commission denied old age assistance payments under the provisions of the State's Social Security Act, on the ground that the plaintiff had "income sufficient to meet his needs for a reasonable subsistence compatible with decency and health," such income being furnished by his son. Plaintiff appealed, alleging that the commission refused to consider the son's financial

9. Ill. Const. art. IV, sec. 3.

10. (1918) 83 Tex. Crim. Rep. 134, 201 S. W. 986.

11. National Defense Act (1916) 39 Stat. 211, sec. 111, 32 U. S. C. A. (1928) sec. 81.

12. Act of May 18, (1917) 40 Stat. 76, 50 U. S. C. A. (Supp. 1940) sec. 201.

13. Pub. Res. No. 96, 76th Cong., 3d sess. (August 27, 1940).

14. Executive Order Fed. Reg. (September 4, 1940) Vol. 5, No. 172.

15. Army Regulations (March 1940) 130-10, sec. 12.